Supreme Court, U. S.
FILED
JAN 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-846

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

vs.

RANDAL RUSH,
Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Garnishee-Appellant.

On Appeal From the Supreme Court of Minnesota

APPELLEE'S MOTION TO DISMISS OR AFFIRM

RICHARD I. DIAMOND
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
Telephone: 612-333-7155
Attorney for Appellee

Of Counsel:
Schermer, Schwappach,
Borkon and Ramstead, Ltd.
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
Telephone: 612-333-7155

1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

	Page
Motion to Dismiss or Affirm	1
Statement of Issue	2
Statement of Proceedings	2
Argument:	
The Appeal Presents No Substantial Federal Question Necessiting Further Argument.	3
Conclusion	7

TABLE OF AUTHORITIES

Constitutional Provisions:

Fourteenth Amendment to United States Constitution.	2

Statutes:

Minnesota Statutes:	
Minn. Stat. §571.41	2
Indiana Statutes:	
Burns Ind. Stat. Ann. §34-1-2-2	5

Rules:

Supreme Court Rules, Rule 16	1
Minnesota Rules of Civil Procedure, Rule 4.04(2)	4

Cases:

Supreme Court cases:	
Coffin Bros. v. Bennett, 277 U.S. 29, 48 S.Ct. 422. 72 L.Ed. 768 (1928)	4
Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905)	5
McKay v. McInnis, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929)	4

Milliken v. Meyers, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 78 (1940) 4
Mitchell v. W. T. Grant Company, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed. 2d 406 (1974) 4
Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921) 4
Federal Court cases:
Minichiello v. Rosenberg, 410 F.2d 106 (2nd Cir. 1968), cert. denied, 396 U.S. 844, 90 S.Ct. 69, 24 L.Ed.2d 94, rehearing denied, 396 U.S. 949, 90 S.Ct. 370, 24 L.Ed.2d 254 (1969) 6
Jeans v. Mitchell, 418 F.Supp. 370 (D.Minn. 1976) 3, 6
Rintala v. Shoemaker, 263 F.Supp. 1044 (D.Minn. 1973) 6
State Court cases:
Seider v. Roth, 17 N.Y. 2nd 111, 269 N.Y.S.2nd 99, 216 N.E.2d 312 (1966) 6
Simpson v. Loehmann, 21 N.Y.2d 990, 290 N.Y.S. 2d 914 (1968) 4
Victor v. Lyon Associates, Inc., 21 N.Y.2d 695, 287 N.Y.S.2d 424, 234 N.S.2d 459, appeal dismissed for want of a substantial Federal question, sub nom. Hanover Ins. Co. v. Victor, 393 U.S. 7, 89 S.Ct. 44, 21 L.Ed.2d 385 (1968) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-846

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

vs.

RANDAL RUSH,
Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Garnishee-Appellant.

On Appeal From the Supreme Court of Minnesota

APPELLEE'S MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Supreme Court Rules, appellee hereby respectively moves the Court to dismiss the pending appeal in this matter, or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of the State of Minnesota. This motion is brought on the grounds that the appeal presents no substantial or

undetermined federal question on which the decision of this appeal depends and thus does not require further argument.

STATEMENT OF ISSUE

Is Minn. Stat. §571.41, which permits pre-judgment garnishment to establish *quasi in rem* jurisdiction where the garnishee and the debtor are parties to a contract of insurance, constitutional as constructed and applied by the Minnesota Supreme Court in favor of a Minnesota resident plaintiff against a non-resident defendant insured by a carrier doing substantial business in Minnesota for an accident occurring outside of Minnesota, in compliance with the non-resident's right to due process of law under the Fourteenth Amendment?

STATEMENT OF PROCEEDINGS

Appellee, a Minnesota resident for all relevant purposes of this appeal, was injured while a passenger in an automobile driven by defendant-appellant, an Indiana resident, in an accident in Indiana. Defendant was insured for automobile liability purposes by garnishee-apppellant which issued the particular policy in Indiana but which conducts a very substantial business in Minnesota. Appellee commenced suit in state court in Minnesota by causing a garnishment summons to be served upon the insurer in Minnesota pursuant to the challenged statute. Upon receipt of a "nothing owing" disclosure, appellee made a showing of probable cause before the Minnesota District Court and the court added garnishee as a party to the action, pending resolution of the suit on its merits. Defendant was personally served in Indiana with notice of the garnishment and the Summons and Complaint.

Appellants moved to dismiss the cause of action, alleging lack of jurisdiction by the Minnesota court over appellants and the subject matter and properly raising the constitutional issue. The trial court denied the motion and on appeal the Minnesota Supreme Court affirmed, both on the basis of state law and on the constitutionality of the procedure. Shortly thereafter, the Minnesota Federal District Court in *Jeans v. Mitchell,* 418 F.Supp. 730 (D. Minn. 1976) reaffirmed the constitutionality of the statute challenged herein as constructed and applied.

ARGUMENT

I.

THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NECESSITATING FURTHER ARGUMENT

1. The Minnesota statutory pre-garnishment statute, together with the additional procedural safeguards established by the Minnesota Supreme Court below, clearly complies with the requirements of procedural due process established by this Court. In upholding the constitutionality of the procedure, the Minnesota Supreme Court required that (1) proper notice must be given to the defendant-insured, affording him adequate opportunity to defend his property; (2) defendant could not be exposed to liability greater than the amount of his insurance policy and (3) the procedure must be utilized only by residents of the forum state (Jurisdictional Statement A-14). These factors are the very elements recognized by the decisions of this Court in upholding similar pre-judgment attachment and garnishment pro-

cedures against a due process challenge. See, *McKay v. McInnis*, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929); *Coffin Bros. v. Bennett*, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928); *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921); *Mitchell v. W. T. Grant Company*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2nd 406 (1974).

In this matter, defendant was personally served with notice of garnishment and the Summons and Complaint. Since the Minnesota Supreme Court, similar to the New York court in *Simpson v. Loehmann*, 21 N.Y.2d 990, 290 N.Y.S.2d 914 (1968), clearly held that Rule 4.04(2) of the Minnesota Rules of Civil Procedure, which, in effect, abolished limited appearances for the purposes of contesting jurisdiction in a *quasi in rem* case, does not apply to a case under the challenged statute, no personal jurisdiction, i.e., jurisdiction beyond the policy limits, attaches in this type of case. Finally, appellee was clearly a Minnesota resident at the the time of commencement of the lawsuit. Thus, the Minnesota pre-garnishment procedure, by affording proper notice to the defendant-insured and permitting a limited appearance; by restricting recovery against him to the amount of the insurance policy limits; and by making the procedure available only to residents of the state, clearly comports with the requirements of procedural due process.

2. Given the existence of a garnishable debt under state law, the situs of the debt in Minnesota, together with the State's legitimate interest in providing a forum for its residents, more than adequately complies with "traditional notions of fair play and substantial justice," *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 78 (1940), such that the challenged statute is clearly constitutional as

applied. The constitutional question does not require a determination of the liquidated nature of the obligation of insurer to insured under these circumstances. The Minnesota Supreme Court, as the highest authority on questions involving purely state law, held that the statute in question was enacted as an exception to the general rule that an obligation must be due absolutely without contingency before being subject to garnishment (J.S. A-12). Thus, under the clear decisions of this Court, the debt has situs with the garnishee's presence in Minnesota and the debtor is thus subject to *quasi in rem* jurisdiction remedies against the debt in that location. *Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905). Moreover, the Minnesota Supreme Court is clearly in the best position to determine the strength of the Minnesota's interest in providing a forum to its residents. Certainly, the Minnesota court has spoken out very strongly in this regard. (J.S. A-14, note 5).

3. The Minnesota Supreme Court also recognized an additional safeguard in the availability of a *forum non conveniens* motion under the proper circumstances. Although there is no hint of forum shopping in this matter (see Memorandum of Trial, Judge, J.R. A-2), the availability of the motion protects against potential abuses. The specious counter-argument interposed by appellant, viz., that the Minnesota federal courts are overcrowded, does not reach constitutional dimensions in that there is no guarantee in any jurisdiction of a readily available place on the court calendar. Moreover, any potential issue is clearly overbalanced in this matter by the fact that the statute of limitations in the only alternative state forum, Indiana, has run. Burns Ind. Stat. Ann. §34-1-2-2 (two years).

4. In the past this Court twice has refused to consider the procedure first established in *Seider v. Roth*, 17 N.Y. 2nd 111, 269 N.Y.S.2nd 99, 216 N.E.2d 312 (1966). This Court dismissed an appeal involving the propriety of attaching an insurer's obligation under state law in *Victor v. Lyon Associates, Inc.*, 21 N.Y.2d 695, 287 N.Y.2d 424, 234 N.E.2d 459, appeal dismissed for want of a substantial federal question, *sub nom. Hanover Ins. v. Victor*, 393 U.S. 7, 89 S.Ct. 44, 21 L.Ed.2d 385 (1968) and denied certiorari in a decision upholding the constitutionality of the *Seider* procedure in *Minichiello v. Rosenberg*, 410 F.2nd 106 (2nd Cir. 1968), cert. denied, 396 U.S. 844, 90 S.Ct. 69, 24 L.Ed.2d 94, rehearing denied 396 U.S. 949, 90 S.Ct. 370, 24 L.Ed.2d 254 (1969). Moreover, although appellant contends that the *Seider* procedure has been "categorically rejected as a legitimate jurisdictional theory" in ten states (J.R., page 7), in none of those decisions was the rejection grounded on a constitutional basis. Rather, in each state which rejected the procedure, the state courts, or the federal courts applying state law, concluded that the state garnishment statute itself did not support *quasi in rem* jurisdiction. Clearly, the Minnesota courts, both federal and state, have reached an opposite result under the Minnesota prejudgment garnishment statute. *Rintala v. Shoemaker*, 362 F.Supp. 1044 (D.Minn. 1973); *Jeans v. Mitchell, supra*. There is thus nothing about the present matter to suggest that it warrants further consideration by this Court.

CONCLUSION

On the basis of the arguments advanced and the authorities cited herein, it is respectfully submitted that appellee's motion to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of the State of Minnesota be granted.

Respectfully submitted,

RICHARD I. DIAMOND
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
Telephone: 612-333-7155
Attorney for Appellee

Of Counsel:
SCHERMER, SCHWAPPACH,
BORKON & RAMSTEAD, LTD.
1010 Midwest Plaza Building
801 Nicollet Mall
Minneapolis, Minnesota 55402
Telephone: 612-333-7155